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TAXATION OF THINGS IN TRANSIT. II.[1]

III.

THE essence of the vice of extraterritoriality in taxation is the taking toll of values that lack the requisite relation to the territory which they are asked to help support. Where this requisite relation is protection to the property in question, a State sucks sustenance from extraterritorial values if it levies a tax for a period longer than that in which the property is under its protection. A boarder who has a room for a week ought not to pay as much as one who has a room for a year. Even if the landlord finds it convenient to post his books but once a year and to send out his bills only when his books are posted, he should vary his charges according to the duration of his hospitality. By any nice calculus a State should be held to the same rule in levying taxes on property which enjoys its hospitality. A difference is to be noted, however. Chattels which visit a State do not register on their arrival. They accept accommodations without asking leave. For those that chance to get caught on tax day, there may be many more that go scot-free. This, as we shall see later, may help to explain the cases which have allowed the taxation of things temporarily present. It bears even more directly on the cases which allow a State to take an average of the incursions of property from other jurisdictions and to regard property of a certain value as permanently present, even though the physical units may vary from day to day. If the average and the valuation of the total are rightly estimated, no violation of the injunction against extraterritoriality is committed. A corporation which used a room in a hotel every day

[1] For the preceding instalment see 7 VA. LAW REV. 167 (December, 1920).

in a year would have to pay for a year's use, although it filled the room with a different employee each day. The result would be the same if each week it used seven rooms for one day each. This seems so simple that it is surprising that the Supreme Court should ever have had any difficulty in applying the same principle to the taxation of the average of property within a State throughout the year. The principle won a majority of the court as soon as it asked for recognition, but only over the strong protest of the minority.

It was recognized from the beginning that property is not entitled to exemption merely because it is an instrument of interstate commerce. This first appeared most clearly in Gloucester Ferry Co. *v.* Pennsylvania [2] in 1885, although it had been plain enough earlier. The Gloucester Ferry Case involved a tax which was found to be one on doing business within the State: it held that the commerce clause forbids such a tax on a foreign corporation engaged exclusively in interstate commerce. In the course of his opinion Mr. Justice Field remarks that "it is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the state." [3] He points out that the cases which exempted ships went on the ground of temporary presence. He says that in Hays *v.* Pacific Mail Steamship Co.[4] it "was held that the vessels were not subject to taxation in California, as they were only temporarily there while engaged in lawful trade and commerce; that their *situs* was at their home port, where their owners were liable to be taxed for the capital invested." [5] He tells us that the court in St. Louis *v.* Wiggins Ferry Co.[6] "held that the tax was illegally levied, as the boats were not property within the city." [7] He adds later that "it is conceded that the property in a State belonging to a

[2] (1885) 114 U. S. 196, 5 Sup. Ct. 826.
[3] *Ibid.*, 206.
[4] (1855) 17 How. (58 U. S.) 596, 7 VA. LAW REV. 169.
[5] 114 U. S. 196, 206-207.
[6] (1871) 11 Wall. (78 U. S.) 423, 7 VA. LAW REV. 172.
[7] 114 U. S. 196, 208.

foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business. . . ." [8] This is *dictum*, but it is put forth as unquestioned gospel. Mr. Justice Field appears to assume that migratory property like ships is as taxable as a railroad track, provided the requisites of jurisdiction appear. Three years later in Marye *v.* B. & O. R. Co.[9] Mr. Justice Matthews is more specific. His remarks are *obiter* because the rolling stock in question was held not taxable under the statute. But without objection from any of his colleagues he declares:

> "It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property, used and found within its territorial limits as this property was used and found, if, and whenever, it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, it is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner, by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of the movable personal property, and the Railroad Company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be

[8] *Ibid.*, 211.

[9] (1888) 127 U. S. 117, 8 Sup. Ct. 1037.

> considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case." [10]

Among the members of the court at this time were Justices Bradley, Field and Harlan. They let Mr. Justice Matthews have his say without opposition. Yet three years later they vigorously contested the position he had taken. This was in Pullman's Palace Car Co. *v.* Pennsylvania,[11] which allowed Pennsylvania to tax such proportion of the capital stock of the plaintiff car company as the number of miles over which it ran cars in Pennsylvania bore to the whole number of miles over which its cars were run. The majority accepted the contention of the plaintiff that the "tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property." [12] The minority appeared to take the same position, but they insisted that the property of the company had no *situs* in Pennsylvania. While Mr. Justice Gray for the majority says that the only question of which the court has jurisdiction is whether the tax violates the commerce clause, he does not explicitly refer to the contention on the part of the State that, if "the tax is in its nature a lawful tax, and the property subjected to it is not protected from its operation by reason of its employment in the operations of interstate commerce, the question of *situs* is not a federal question." [13]

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[10] *Ibid.*, 123-124.

[11] (1891) 141 U. S. 18, 11 Sup. Ct. 876. That the court had some difficulty in reaching a decision is to be inferred from the fact that the case was first argued on October 18, 1888, and was ordered for reargument November 5, 1888. The reargument occured on March 6, 1890, and the decision was handed down May 25, 1891.

[12] 141 U. S. 18, 25.

[13] See the abstract of the brief in 35 L. Ed. (U. S. Supreme Court Reports) 615. For this contention the attorneys cited Delaware Railroad Tax (1874) 18 Wall. (85 U. S.) 206; Erie R. Co. *v.* Pennsylvania (1875) 21 Wall. (88 U. S.) 492, 498; and Kirtland *v.* Hotchkiss (1879) 100 U. S. 491. Nothing in these cases supports the contention that an issue as to *situs* does not raise a federal question. In the Delaware Railroad Tax Case, Mr. Justice Field says of the objection that the statute "im-

Attorneys for the company had cited State Tax on Foreign-held Bonds [14] for the contention that "to exercise the power of taxation the legitimate subject matter of taxation—persons, property, or business—must be found within the jurisdiction of the State",[15] and St. Louis *v.* Wiggins Ferry Co.[16] for the position that "where there is jurisdiction neither as to persons nor property, the imposition of the tax would be *ultra vires* and void." [17] But they do not appear to have invoked the Fourteenth Amendment in support of their objections. No mention of due process appears in the minority opinion of Mr. Justice Bradley. Yet his dominating idea was that the cars had no *situs* in Pennsylvania. It was not until ten years later that the requirement of *situs* was definitely made part of the mandate of the Fourteenth Amendment;[18] and two years after that two Justices had doubts about it.[19] Now that the matter is settled,

poses taxes upon property beyond the jurisdiction of the state": "If such be the fact, the tax to that extent is invalid, for the power of taxation of every state is necessarily confined to subjects within its jurisdiction." (18 Wall. 206, 209.) This case is discussed in 32 HARV. LAW REV. 236-238. In the Erie Railroad Case, the Supreme Court said that it would accept the judgment of the State court that the company was doing business within the meaning of the statute, even though in another case it had accepted the judgment of another State court adopting a different construction of a similar statute. The Supreme Court also observed that, if the State had the power to impose the tax, "the extent and the proportion to which it is carried belongs to the judgment and discretion of the State only." (21 Wall. 482, 498.) This is quite different from a decision that if a tax is in its nature a lawful tax, the question whether any item of property assessed has a *situs* within the State is not a federal question. The Kirtland Case qualified its ascription of wide power to the State by the limitation "where the subjects to which it applies are within her jurisdiction". (100 U. S. 491, 498.)

[14] (1873) 15 Wall. (82 U. S.) 300. See 7 VA. LAW REV. 173, note 16.

[16] Note 6, *supra.*

[15] 35 L. Ed. 614.

[17] 35 L. Ed. 614.

[18] Louisville & J. Ferry Co. *v.* Kentucky (1903) 188 U. S. 385, 23 Sup. Ct. 463.

[19] In Union Refrigerator Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 211, 26 Sup. Ct. 36, Mr. Justice Holmes, in dissenting, said: "It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice [Fuller] feels the same difficulty, I think it proper to say that my doubt has not been removed." See 20 COLUMBIA LAW REV. 283, 286-289.

it seems reasonable to treat all talk of *situs* as related to the present-day conception of due process of law.

The majority opinion in the Pullman Case leaves some doubt as to its conception of *situs*.[20] Mr. Justice Gray has one sentence which, isolated from its context, would indicate that temporary presence is enough to bring chattels within a State's general jurisdiction to tax. This declares that "the State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders." [21] But this is preceded by the statement:

> "The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them." [22]

This indicates that the sentence first quoted should be taken as intended to apply only to the situation then before the court. The restriction becomes even clearer when we find Mr. Justice Gray going on to say:

> "The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within

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[20] It is made clear that there is no difficulty in taxing tangibles elsewhere than at the domicil of their owner. In the second paragraph of his opinion, Mr. Justice Gray says:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the laws of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could easily be carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used." (141 U. S. 18, 22.)

[21] 141 U. S. 18, 26.

[22] *Ibid.*

> the State; but the Company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found as a matter of fact, that the Company continuously, throughout the period for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State." [23]

Earlier Mr. Justice Gray had put the exemption of ships in a State "at whose ports they incidentally and temporarily touch" on the ground that "they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and therefore can be taxed only at their legal *situs*, their home port and the domicil of their owners." [24] In putting these cases to one side he observed: "Between ships and vessels, having their *situs* fixed by Act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily, and cars or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious." [25]

Such a loose opinion leaves several questions open. Is it important that there were always some cars within the State, or would two hundred cars for six months serve as well as one hundred cars for a year? Must the values within the State be represented in a number of tangible units, or could a fraction be taken of a single car that made repeated visits? Do ships get some special immunity because they ride the water and are regulated by Congress, or could they be taxed the same as cars if an average might be regarded as constantly within a single jurisdiction? We have learned since that ships may be taxed in a State which they never leave,[26] but the Supreme Court has not been called upon to consider whether the device applied to cars in the Pullman Case is applicable as well to ships that continuously follow each other in and out of a State. It is hard to find any good reason for a difference, either in the commerce clause or in any conception of extraterritoriality. As. Mr. Jus-

[23] *Ibid.* [24] *Ibid.*, 23.

[25] *Ibid.*

[26] Old Dominion S. S. Co. *v.* Virginia (1905) 198 U. S. 299, 25 Sup. Ct. 686, 7 VA. LAW REV. 178.

tice Bradley pointed out in the dissenting opinion: "To contend that there is any difference between cars and trains of cars and ocean steamships in this regard, is to lose sight of the essential qualities of things." [27] Mr. Justice Gray would have done better, had he contented himself with pointing out that the ships which escaped taxation bore a different practical relation to the State where they were on tax day, and that the statutes under which they were assessed were unlike the Pennsylvania law before him.

There was further dispute in the Pullman Case as to whether Pennsylvania's mode of assessing the value of the car property within its borders was a suitable one. This will be considered in a moment. The minority did not confine their objections to this. Mr. Justice Bradley declared that "the real question in the present case is as to the *situs* of the cars in question." [28] After discussing the mode of assessment, he says again that "the more serious difficulty lies in the question of the *situs* of the property, and the consequent jurisdiction of the State of Pennsylvania to tax it." [29] He insists on looking at the cars as separate, unrelated individualities. It is after speaking of the *situs* of the property and the lack of jurisdiction over it that he goes on:

> "It is not fast property, it does not consist of real estate; it does not attach itself to the land; it is movable and engaged in interstate commerce, not in Pennsylvania alone, but in that and other States, and the question is, How can such property be taxed by a State to which it does not belong? It is indirectly, but virtually, taxing the passengers, —many of them carried from New York to Chicago, or from Chicago to New York, and most of them from one State to another. It is clearly a burden on interstate commerce. The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number of them continuously abide there. But how can they be said to abide there when they only stop at Philadelphia and other stations to take on passengers? And it is all the same whether they cross the State entirely, or run into or out of other States with a terminus in Pennsylvania." [30]

[27] 141 U. S. 18, 27.

[28] *Ibid.*, 34.

[29] *Ibid.*, 35.

[30] *Ibid.*

Yet earlier the dissenting Justice had conceded that an office or warehouse with its furniture might be taxed, though used exclusively as an adjunct to interstate commerce.[31] Plainly all that troubled him was the transient presence of the individual cars. The physical objects got so close to his eyes that he could not see that from the standpoint of values and not of mere wood and steel a succession of transient daily presences may yield an average yearly presence. It seems obvious that from a common sense point of view the Pullman Company was taxable on something. The only serious question in the case was whether Pennsylvania had used the right mathematics to find out her share of that something.

In the next case in which the taxation of migratory cars was questioned, dispute as to the assessment was foreclosed by the agreed statement of facts. This was American Refrigerator Transit Co. *v.* Hall,[32] in which it was stipulated that if the property was assessable the amount levied was just and reasonable. The company reported the number of cars in the State on tax day and placed the value of each car at $250. This number was two more than the average number which it conceded to be in the State during the year, but it waived this discrepancy by agreeing that the assessment was reasonable. The company contended that the cars acquired no *situs* in Colorado, and the court treated the contention as one based on the Fourteenth Amendment as well as on the commerce clause. Mr. Justice Shiras opens his opinion by saying:

> "In this record we again meet the problem, so often presented, how to reconcile the rightful power of a state to tax property within its borders with its duty to obey those provisions of the Federal Constitution which forbid the taking of property without due process of law, and the imposition of burdens upon interstate commerce." [33]

This seems to incorporate previous discussions of *situs* and jurisdiction to tax into the law of the Fourteenth Amendment.

[31] *Ibid.*, 31-32.
[32] (1899) 174 U. S. 70, 19 Sup. Ct. 599.
[33] *Ibid.*, 74.

Except for this, the opinion adds nothing to what had previously been declared. It concludes by saying:

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in a like way by its citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid." [34]

Justices Harlan and White dissented, but without opinion. The case was followed a year later in Union Refrigerator Transit Co. *v.* Lynch,[35] in which Mr. Justice White did not sit. Mr. Justice Harlan now accepted the doctrine he had previously resisted. Ten cars were taxed at a valuation of $260 each. Chief Justice Fuller observed that "the objection is not that too many cars were assessed, or that they were assessed too much, or in an improper manner, even if we could consider such questions, but simply that they could not be taxed at all." [36]

The question whether too many cars were taxed is obviously vital to the issue of extraterritoriality. Where an average is taken, the average must represent the actual situation. Where the property within the State is not assessed in isolation, but is treated as a fractional part of the entire property of the taxpayer scattered through several States, the fraction must be fair or a State may tax property outside the State under the guise of valuing what is within. The Supreme Court had de-

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[34] *Ibid.*, 82.

[35] (1900) 177 U. S. 149, 20 Sup. Ct. 631.

[36] *Ibid.*, 154.

clared this by way of *dictum* as early as 1874,[37] and it seems pretty clear that it has never since intended to depart from it. It has, however, from the beginning put upon the complaining taxpayer the burden of showing wherein the apportionment is unfair. So far as appears from available abstracts of the briefs for the complainant in Pullman's Palace Car Co. *v.* Pennsylvania,[38] no contention was there made that the assessment was too large, if the company was taxable at all. The minority twice express doubts as to the propriety of the mileage ratio there used, but in both instances immediately pass on to the issue whether the property was taxable at all. It has been sometimes assumed that the majority intended to give unqualified approval to the universal use of the mileage ratio applied to total capital stock. This is based on the paragraph of Mr. Justice Gray's opinion which reads:

> "The mode which the State of Pennsylvania adopted, to ascertain the proportion of the Company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the Company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the Company would be assessed upon the whole value of its capital stock, and no more." [39]

[37] Mr. Justice Field says in Delaware Railroad Tax (1874) 18 Wall. (85 U. S.) 206, 230-231:

> "In the second place, assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware, according to the ratio of the length of its road to the length of the whole road, must necessarily fall upon property out of the State. The length of the whole road is in round numbers one hundred miles; the length in Delaware is twenty-four miles. The tax upon the property according to this ratio would be in Delaware 24/100 or 6/25 of the amount of the tax upon the whole property. But the value of the property in Delaware is not 6/25 of the value of the whole property, but much less than that proportion would require.
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> "We repeat, therefore, that upon the assumption made by the appellant there would be great difficulty in sustaining the tax."

[38] Note 11, *supra*.

[39] 141 U. S. 18, 26.

Mr. Justice Gray then cites cases where the mileage ratio, applied to total capital stock, was allowed in assessing railroad and telegraph companies.[40] Did he mean that this would do under any and all circumstances?

This was not so understood by the Supreme Court six years later. In Adams Express Co. *v.* Ohio State Auditor,[41] Mr. Justice Fuller cited the Pullman Case following a statement that the property of railroad, telegraph and sleeping-car companies extending through several States might be valued as a unit "and that a proportion of the whole *fairly and properly ascertained* might be taxed by the particular State, without violating any Federal restriction." [42] Mr. Justice White, in his dissenting opinion, was much more specific about the ruling in the Pullman Case. He contended that the Pullman Case did not go on the theory that the property of the Pullman Company was a unit, but that the Supreme Court adopted the idea of the State court that Pennsylvania was taxing one hundred cars having an actual *situs* in the State. This seems far-fetched, in view of the indisputable fact that the assessment took a proportion of the total capital stock. The property *was* valued as a unit and a proportion of the total value was taken as the value of the property within the State, whatever the theory on which the court proceeded. Mr. Justice White is more illuminating when he goes on to tell why the court thought this worked out fairly in the particular case. Referring to Mr. Justice Gray's statement, quoted in the preceding paragraph, he says:

> "When, however, it was said (p. 26) that the method of assessment, to-wit, taking a proportion of the capital stock ascertained on the mileage basis, as the value of one hundred sleeping cars was a just and equitable method, such statement was made with reference to the facts held to exist in the case before the court. What were those facts? The taxes demanded covered a period of eleven years, and

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[40] State Railroad Tax Cases (1876) 92 U. S. 575; Delaware Railroad Tax, note 13, *supra;* Erie R. Co. *v.* Pennsylvania, note 13, *supra;* Western Union Telegraph Co. *v.* Attorney General of Massachusetts (1888) 125 U. S. 530, 8 Sup. Ct. 961; Marye *v.* B. & O. R. Co., note 9, *supra.*

[41] (1897) 165 U. S. 194, 17 Sup. Ct. 305.

[42] *Ibid.*, 220. Italics are writer's.

excluding interest from the time when payable and the attorney general's commission for collecting, aggregated but $16,321.89. Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 158. Surely, this court might well say that a rule of taxation which operated to assess on one hundred sleeping cars a tax of less than $1500 per annum was, in the absence of any showing to the contrary, just and equitable to the company. No such showing was made. The objection advanced by counsel to the method of taxation was not that the results produced were inequitable, but that (theoretically, not practically) the method adopted was improper." [43]

These statements in majority and minority opinions six years after the Pullman Case were sufficient to show that the Supreme Court had no idea of allowing a State free rein in using a mileage ratio for the assessment of its share of the migratory cars of an interstate transportation company. Between the Pullman Case and the Adams Express Case it had indicated that the total to which the ratio is applied must exclude outside property that does not contribute to the value of what is being taxed. The majority opinion in the Adams Express Case refers to this when it says:

"Special circumstances might exist, as indicated in Pittsburgh, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of the aggregate value would be upon the mileage basis." [44]

[43] *Ibid.*, 249-250.

[44] *Ibid.*, 227. The reference to 154 U. S., at page 443, is to Cleveland, C. C. & St. L. R. Co. *v.* Backus, decided the same day as the Pittsburgh case cited by Chief Justice Fuller. The statement referred to is that "it is assumed that no special circumstances exist to distinguish between the conditions in the two States, such as terminal facilities of enormous value in one and not in another." In Pittsburgh, C. C. & St.

In these cases which allowed the application of the unit rule, the minority insisted that the State was taxing property outside its borders when it took account of such property in assessing the value of what was within its jurisdiction. The answer of the majority was that the value of property within the State might be enhanced by its use as part of a larger plant or system and that there is no extraterritorial taxation if the State takes only its proper share of the value of the whole.

It was apparent in the Adams Express Case that the result of this method was to assess the Ohio property at several times its value as separate items of horses, desks, wagons, etc. So in an opinion denying a rehearing Mr. Justice Brewer pointed out that Ohio was taxing intangible as well as tangible property.[45] This so-called intangible property was substantially the value of the business in which the company was engaged. As this business was largely interstate commerce, this raised a serious difficulty under traditional conceptions of the commerce clause.[46] The difficulty was brushed aside by asserting that it was settled that a State may tax property notwithstanding its employment in interstate commerce and that the value of property depends

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L. R. Co. *v.* Backus (1894) 154 U. S. 421, 431-432, 14 Sup. Ct. 1114, Mr. Justice Brewer had said:

> "It is true there may be exceptional cases, and the testimony offered on the trial of this case in the circuit court tends to show that this plaintiff's road is one of such exceptional cases, as for instances, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the State board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the State shall be absolutely determined upon a mileage basis."

[45] Adams Express Co. *v.* Ohio State Auditor (1897) 166 U. S. 185, 17 Sup. Ct. 604.

[46] The issue under the commerce clause is considered in "Indirect Encroachment on Federal Authority by the Taxing Powers of the States", 32 HARV. LAW REV. 234-265.

upon the use to which it is put. This is clear enough in the case of real estate, but it was something of a stretch to apply it to wagons, etc., used by an express company. But the offence, if any, of taxing business as intangible property is solely against fictitious formulations of the requirements of the commerce clause. It is no form of the vice of extraterritoriality, so long as the value reached is no more than that of the business within the taxing jurisdiction.

The Adams Express Case was fought under the banner of the Fourteenth Amendment as well as under that of the commerce clause. It settles that due process permits what was there sanctioned. It indicates that the restrictions on the application of the unit rule there suggested are restrictions required by due process. Not only must the apportionment be fair, but the property must be of a kind which is really enhanced in value by its relation to the property outside. The unity there predicated of the total property of the express company was called a unity of use and management. Chief Justice Fuller evidently thought that unity of ownership would not be enough, for he says:

> "The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store, or *vice versa,* nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business." [47]

[47] 165 U. S. 194, 222. While something more than unity of ownership is doubtless necessary to apply the unit rule to the assessment of property in different States, it seems that income from business within a State may be assessed by taking a fraction of the taxpayer's income from business in all States, even though the business in the taxing State is largely manufacturing and that in the other States is largely the selling, leasing or repairing of the articles manufactured in the taxing State. Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. ——, 41 Sup. Ct. 45 (November 15, 1920).

Clearly, if anything restricts the application of the unit rule to such property, it must be the requirement of due process, since the enterprises referred to need not involve interstate commerce. So it appears that the Fourteenth Amendment alone is a shield against the wrongful use of extraterritorial values.

All doubt on this point is set at rest by Union Tank Line Co. *v.* Wright,[48] in which objection to the mileage ratio for the assessment of migratory tank cars was based on the Fourteenth Amendment alone. Mr. Justice McReynolds put the applicable principles as follows:

> "A State may not tax property belonging to a foreign corporation which has never come within its borders,—to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the State according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system'. How to appraise them fairly when the tangibles constitute part of a going concern operating in many States often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct,—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. *v.* Atty. Gen.), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. *v.* Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment or both." [49]

The reference to the commerce clause was a gratuity, as the plaintiff had not based any claim on it. It is not mentioned in

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[48] (1919) 249 U. S. 275, 39 Sup. Ct. 276. This case is discussed in editorial notes in 19 COLUMBIA LAW REV. 334, 3 MINN. LAW REV. 421, and 29 YALE LAW JOURN. 614.

[49] 249 U. S. 275, 282. The cases referred to by Mr. Justice McReynolds are cited in notes 32 and 40, *supra*.

the available abstract of its brief, and in stating the facts Mr. Justice McReynolds says: "Thereupon, the plaintiff in error instituted this proceeding in Fulton County superior court, alleging invalidity of the assessment, that to enforce it would violate the 14th Amendment, and asked appropriate relief." [50] And in stating the conclusion of the court, the opinion says:

> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable, and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce." [51]

The commerce clause is here brought in as something extra and independent. The minority indicated no disagreement with the general principle of the majority. They confined themselves to contending that the case at bar did not come within it. So we may take it as settled that the Supreme Court finds an offence against due process in any attempt on the part of a State to allocate to itself more than its fair share of the value of an aggregate of units roaming about the country.

There is room for dispute as to the precise line drawn in the Union Tank Line Case. The minority do not clearly go any further than to insist that the mileage rule when applied to tank cars is fair on its face. After saying that he "can see nothing arbitrary or unreasonable in the general rule of mileage apportionment" [52] and that he is convinced that the Georgia "statute is not repugnant to the Federal Constitution",[53] Mr. Justice Pitney goes on:

> "If, for any reason that does not appear, the rule operated unfairly in this particular case, and imposed an unjust and inequitable burden of taxation upon plaintiff in error, it was incumbent upon plaintiff in error to show this by calling for an arbitration upon the question of true value, as permitted by the Georgia statutes . . . or by some appropriate proceeding for relief against the excessive part of the taxes. Having failed to do this although properly notified, it cannot in justice be heard to say that the valua-

[50] 249 U. S. 275, 278.

[51] *Ibid.*, 283.

[52] *Ibid.*, 295.

[53] *Ibid.*

tion of its property, made according to a statutory rule that, in its general application is just and reasonable, is in the particular case so excessive as to amount to a deprivation of property without due process of law, or an undue burden upon interstate commerce." [54]

This appears to base the dissent on the ground that the complainant was not entitled to judicial relief until it had exhausted its administrative remedies. Yet Mr. Justice Pitney seems to treat the complaint as one of overvaluation merely. If the dispute is confined to the question of valuation and does not raise the issue of jurisdiction, it may be settled finally by administrative authorities.[55] Hence Mr. Justice Pitney's suggestion contains no clear promise that the minority would have reviewed arbitration proceedings with which the company was dissatisfied. In denying judicial relief on the facts before the court, the minority must rightly mean that those facts raise no issue of jurisdiction. In calling the mileage ratio in its general application just and reasonable, they may very well be taken to mean that it satisfies the requirement of jurisdiction and that any contention that it yields an excessive valuation in the particular case is one solely for administrative relief.

The precise position of the majority is also open to question. They may mean that the mileage ratio will never do for assessing tank cars, or they may mean only that the facts before them show that it will not do in the case at bar. Mr. Justice Day evidently feared that they mean the former, for the reporter tells us that he, "in view of the undisputed facts of this case, concurs in the result." [56] He certainly thought that something in the majority opinion went too far. What he balked at is probably this:

"In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all

[54] *Ibid.*

[55] Hilton *v.* Merritt (1884) 110 U. S. 97, 3 Sup. Ct. 548; Hibben *v.* Smith (1903) 191 U. S. 310, 24 Sup. Ct. 88.

[56] 249 U. S. 275, 286.

> States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length." [57]

This, taken by itself, would mean that the possibility of such extravagant results requires the complete rejection of the rule, even in cases where the tracks of the State are continually crowded. Yet it is not certain that Mr. Justice McReynolds means to go so far. For he adds:

> "Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310,—the challenged assessment specified $291,196.
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> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable. . . ." [58]

Method and results are both adduced, and the facts on which the results are predicated find explicit statement. It is more lawyer-like to overlook Mr. Justice McReynolds's generalities and to take the case as going no further than the facts required it to go. Yet States planning to stick to the mileage ratio for wandering cars have good reason to fear that the Supreme Court may tell them that it will never never do.

Even if the case is confined to its facts, it fails to tell us definitely just how far the States may go. The attorneys for the State entered into a stipulation which seems to assume that the values sought to be reached were those of the cars as independent items of property. The company conceded that in 1913 the average number of its cars within Georgia was fifty-seven, and that they were worth $830 apiece or $47,310 in all. It paid a tax on this amount and sought relief from further demands. The assessment derived from the mileage rule was $291,196 The facts to which the State agreed included the following:

"... and that the assessment so entered by the defend-

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[57] *Ibid.*, 283. [58] *Ibid.*

ant in his office against the plaintiff's property during said period for each of said years embraces the valuation of about three hundred cars in excess of what the plaintiff actually had in the State of Georgia during said years, of the approximate value of $250,000 each year; and that the true value of a tank car is about eight hundred and thirty ($830) dollars per car.

"That for the year 1914 the assessment entered against plaintiff by defendant covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the State of Georgia for the time said tax was assessed.

"That defendant, in entering said assessment, never undertook to ascertain the actual property of the plaintiff located in the State of Georgia during the said years, or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere. . . ." [59]

Mr. Justice McReynolds makes the concession somewhat more damaging when he says that "the comptroller general made no effort to assess according to real value or otherwise than upon the ratio",[60] etc. The stipulated facts did not contain the particle "or" which the opinion of the court injected, so that the State in the last paragraph above quoted did not concede that the mileage rule was not an effort to ascertain the real value of the property within the State, as Mr. Justice McReynolds makes it seem to. But earlier it had conceded plainly enough that its assessment covered the value of more cars than the plaintiff had within the State and so made it exceedingly difficult to contend that this excess represented other values within its jurisdiction.

This may not have been so foolish as it seems at first glance, since the Georgia statute discloses no effort to assess the cars in any other way than as independent material objects. It directs the mileage ratio to be applied, not to the company's total capital stock, but to the total value of all its cars everywhere.[61]

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[59] *Ibid.*, 279. [60] *Ibid.*, 283.

[61] The pertinent portions of the Georgia statute are printed on the margin in 249 U. S. 275, 280.

This excludes from the total the capitalization of the earnings derived from the use of the cars. The cars worth about $50,000 as separate items might conceivably earn fifteen to twenty thousand dollars a year and so yield the company normal interest on the $300,000 or so on which Georgia laid its hand. The difference between these two items would be what was called "intangible property" in the Adams Express Case. The Ohio statute there involved did not name intangible property as the subject of its assessment, and it took a second opinion from the Supreme Court, in denying a rehearing,[62] to make it entirely clear that this was what the State was in substance taxing. The attorney for the taxpayer in the Union Tank Line Case sought to exclude the consideration of intangible value by urging:

> "It may well be doubted whether such average number of cars can ever be properly ascertained by means of a rule of proportion where the owner of the cars is not doing business in the State, for the reason that no rule of proportion is accurate, and an arbitrary and approximate basis of assessment should only be adopted where the actual amount and value of the property cannot be directly ascertained. Wherever a rule of proportion has been upheld as a basis of assessment, it has been in connection with the assessment of intangible as well as tangible property."[63]

The majority opinion did not specifically notice the contention that intangible property could not be taxed if the company was not doing business in the State, though it observed that the plaintiff leased its cars to the Standard Oil Company to be operated by it and that the plaintiff "has never carried on business or had an office in Georgia".[64] Indeed, the majority opinion contains no discussion of intangible property as involved in the particular case, though it recognizes that in general the assessment need not be confined to the mere worth of the articles considered separately. If this intangible value were to be excluded in the case before the court, the best, and doubtless a sufficient, reason would be that the Georgia statute itself excluded it. This it did by taking as the base to which the mile-

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[62] Note 45, *supra*.

[63] 63 L. Ed. 603.

[64] 249 U. S. 275, 276.

age ratio is to be applied, not the value of the total capital stock, which would be determined largely by capitalization of earnings, but simply the total value of all the cars owned by the company.

This, however, did not deter the minority from insisting that the intangible value might be assessed under the statute before the court. Mr. Justice Pitney brushes aside the objection that the company was not itself directly doing business in the State, when he says:

> "Nor is the State obliged to ignore the special value that rolling stock has because of its organic relation to, and its customary use in connection with, the railroad tracks upon which it runs. Although the equipment may be held in separate ownership, it may be regarded in fact as an appurtenance of the railroad and valued in that relation. It is admitted that the revenue derived by plaintiff in error from the use of its cars is in part paid by the railroad companies and proportioned to the mileage covered by the run of the cars." [65]

Clearly, if a New Jersey corporation owned a hotel in Georgia which it leased to the Standard Oil Company, the landlord would have to submit to an assessment which took account of what the hotel brought in from the use to which it was put. So far as due process is concerned, the owner of cars leased to others should meet the same fate. There is the objection under the commerce clause that a valuation dependent on earnings takes toll from the fruits of interstate transportation and is a device for imposing a tax on that transportation. But the objection does not prevail when the owner of the property employs it in interstate commerce,[66] and it has even less to stand on when he rents it to others.[67] The use of the cars in Georgia yields a return to their owner. This return is a return from Georgia, whether the company is technically doing business in Georgia or not. If a State in which income is earned may tax

[65] *Ibid.*, 289.

[66] Adams Express Co. *v.* Ohio State Auditor, notes 41 and 45, *supra.*

[67] Erie Railroad *v.* Pennsylvania (1895) 158 U. S. 431, 15 Sup. Ct. 896; Henderson Bridge Co. *v.* Kentucky (1897) 166 U. S. 150, 17 Sup. Ct. 532.

that income though it is paid elsewhere to a nonresident,[68] a State where property is used should be allowed to reach the value of that use. Mr. Justice Brewer covers the point in his opinion denying a rehearing in the Adams Express Case.[69] The intangible property, he says, is distributed wherever the tangible property is located and its work is done. This must be equally true whether the work is done under the immediate control of the owner or of a lessee.

Other positions in the minority opinion are more questionable. It is hard to follow Mr. Justice Pitney when he says:

> "Under the provisions of the Georgia statutes . . ., property taxes were imposed upon the plaintiff in error by reason of the habitual use and employment of its rolling stock within that State, based upon a valuation not limited to the value of the tank cars as separate chattels, but considering their value as part of the entire system of cars owned and operated by plaintiff in error, and regarding these as part of the equipment of the railroads over which they ran." [70]

True, the valuation was not explicitly limited to the value of the average number of cars within the State as separate chattels, but the valuation of the total property of the company, of which a proportion was taken, was limited to value of the cars as separate chattels. The statute commanded the assessor to "ascertain the entire value of all . . . cars of such person or company" [71] and then to apply the mileage ratio. No complaint was made of the total of $10,518,333.16 which the company reported. There can be no doubt that this was confined to the value of its cars as separate chattels. If the mileage ratio worked exactly to show just what proportion of the cars were on the average used in Georgia, Georgia would assign a valuation based on the value of the cars as separate chattels. That seems all that she intended to do. She had no device for getting at a capitalization of the earnings of the total number of

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[68] Travis *v.* Yale & Towne Mfg. Co. (1920) 252 U. S. 60, 40 Sup. Ct. 228. See also Shaffer *v.* Carter (1920) 252 U. S. 37, 40 Sup. Ct. 221; and Underwood Typewriter Co. *v.* Chamberlain, *cit. sup.*, note 47.

[69] Note 45, *supra.*

[70] 249 U. S. 275, 287.

[71] Note 61, *supra.*

cars, such as taking for a base the value of the company's capital stock. If she failed to look to the intangible value of the total property, it is difficult to say that she was looking to the intangible value of the part over which she claimed jurisdiction. She was taking an apportionment, not of total value tangible and intangible, but of the value of the total number of cars as separate chattels. So it would seem that the element of intangible value should be ruled out of the case, unless a rule devised for one purpose can be sanctioned because it fulfills another.

Another objection to Mr. Justice Pitney's opinion may be directed against its hint that the State may relate its tax to the number of different specific cars that enter its borders during the year without regard to the length of their stay. This appears in the statement:

> "Fifty-seven cars simply represents the average number within the State at one and the same time within the year, and is not representative of the number of cars used in the State during the year. This court has declared that a State may lay hold of the average habitual use of movable railroad equipment as a basis of taxation . . .; but there is nothing in the Constitution of the United States to confine the State to that particular method. It is but a method of approximation." [72]

Mr. Justice Pitney ought not to mean that three hundred cars in the State for one day only would justify as big a tax as three hundred cars for three hundred and sixty-five days. Yet, unless he means something of the sort, there is no point to his distinction between the average number of cars in the State at one time and the number of specific cars that enter during the year. Fault may be found also with the deduction that "a valuation according to aggregate car mileage would virtually ignore the particular value due to the relation of the cars to the rail system." [73] The choice between taking aggregate car mileage or

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[72] 249 U. S. 275, 289.

[73] *Ibid.*, 290. Mr. Justice Pitney indirectly slurs the aggregate car mileage measure as presenting greater difficulties under the commerce clause than does the mileage ratio. For he begins the sentence from which the above quotation is made, by saying: "But, even assuming that such a basis could be adopted without in effect regulating inter-

using the track mileage ratio has to do only with the allocation to the State of its due share of the total value of the property in all the States. A ratio of aggregate car mileage within the State to aggregate car mileage everywhere can get at "the particular value due to the relation of the cars to the rail system" whenever the ratio is applied to a total which includes that "particular value". Or the State can reach that "particular value" by multiplying the aggregate car mileage within its borders by the earnings per mile and valuing the property at a capitalization of the figure thus reached.[74] The kind of values to be assessed has no necessary relation to the mode adopted for ascertaining a State's share of the things in which those values inhere. The total value to which Georgia looked was the value of all the cars of the company. This excludes the "particular value due to the relation of the cars to the rail system". If this "particular value" is not in the total, it is hard to see how it can get into any fraction.

Mr. Justice Pitney is happier in pointing out the objections to valuation according to aggregate car mileage. It is apt to put the State at the mercy of the company's computation.

> "For, if the State authorities were required to keep a check either upon the average use or the aggregate mileage covered by the movements of rolling stock within the State, and to supplement this with observations in other States in order to arrive at a due proportion, the cost of administration easily might consume the tax." [75]

On account of such difficulties many of the States have resorted

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state commerce by varying the burden of taxation in direct proportion to the burden of such commerce, ..." The learned Justice's zeal here got the better of his judgment. The idea that a tax which is disproportionate to the business actually done within the State is less a regulation of interstate commerce than one that is proportionate to such business is too absurd to deserve even the comfort of an indirect implication in its favor.

[74] The same end was reached more directly in Cudahy Packing Co. *v.* Mnnesota (1918) 246 U. S. 450, 38 Sup. Ct. 376, which sustained the Minnesota statute imposing a tax directly on the gross receipts from all business done within the State, where this tax was in lieu of a property tax.

[75] 249 U. S. 275, 290.

to the track mileage ratio. Mr. Justice Pitney says that this method was clearly sustained in the Pullman Case which has since been cited with uniform approval. He insists that "the reasoning of the case upon the point now in controversy has never heretofore been regarded as *obiter dictum*."[76] The majority do not deny this, but they affirm that none the less it was *obiter dictum*. Of the situation in the Pullman Case Mr. Justice McReynolds says:

> "The company demanded complete exemption upon the ground that its cars were moving in interstate commerce and had no taxable *situs* in Pennsylvania. The appraisement was not challenged as excessive; if the property was taxable in Pennsylvania, the rule adopted may have been decidedly favorable to the owner and the assessment a moderate one. Having failed to challenge amount of the assessment, the company could not well complain of the rule under which this was fixed. In such circumstances reasonableness of the rule was not really in question, and what was said of it cannot control here where the very point is presented for decision."[77]

Of this there can be little doubt. And, even if Mr. Justice Gray's approval of the Pennsylvania rule had not since been challenged as *obiter*, it was soon declared not to be universal and unqualified.[78] Long before 1919, Supreme Court decisions had made it clear that any application of the unit rule is subject to modification where it can be shown that the valuation of the property as a unit includes elements not properly distributable among the several States in which the unit spreads itself.[79] State courts had held that neither the assessor nor the taxpayer may insist on the mileage ratio in the face of facts which show it unsuitable.[80] Obviously a State can transcend its jurisdic-

[76] *Ibid.*, 294.

[77] *Ibid.*, 285-286.

[78] *Supra*, pp. 255-6.

[79] Fargo *v.* Hart (1904) 193 U. S. 490, 24 Sup. Ct. 498; Meyer *v.* Wells Fargo & Co. (1912) 223 U. S. 298, 32 Sup. Ct. 218; Louisville & N. R. Co. *v.* Greene (1917) 244 U. S. 522, 37 Sup. Ct. 683; Illinois Central R. Co. *v.* Greene (1917) 244 U. S. 555, 37 Sup. Ct. 697.

[80] See, *e. g.*, People *ex. rel.* N. Y., C. & H. R. Co. *v.* Priest (1912), 206 N. Y. 274, 99 N. E. 547; and People *ex rel.* Commercial Cable Co. *v.* State Board of Tax Com'rs (1917) 166 N. Y. Supp. 62.

tion as readily by too large a ratio applied to a proper base as by a proper ratio applied to too large a base.

This brings us back to the question whether the decision of the majority means that the track mileage ratio will never do for assessing migratory cars, or means merely that the facts before the court show that it will not do in the particular case. Mr. Justice McReynolds recognizes that the mileage ratio may have been decidedly favorable to the taxpayer in the Pullman Case. Yet he says that real values cannot be ascertained with even approximate accuracy by such a process. Would he nevertheless allow the process unless a taxpayer can show that its inaccuracy operates to his disadvantage? No certain answer can be ventured, but it may help a little to know whether the taxpayer in the particular case showed that the process was unfair to it. It offered no proof as to the average car mileage in other States. It did not show explicitly that Georgia had fewer cars per mile than did her sisters. It did, however, show the average number of cars in Georgia and prove that the assessment was some $250,000 in excess of the sum for which that number of cars might be obtained. If this excess could be attributed to Georgia's claim to a share of the total intangible property of the company, the company gave no proof that the share claimed was excessive. But if Georgia claimed no share of that intangible property, then the fact that its assessment greatly exceeded the value of the average number of cars within its borders proves that Georgia harbored fewer cars per mile than did her neighbors.

The former hypothesis must be rejected in favor of the latter. Since the total to which the mileage ratio was applied was only the value of all the company's cars as separate chattels, any excess of the Georgia assessment over the value of the average number of cars actually within her borders must be due to the fact that the cars were not evenly distributed over all the miles of track they traversed. Georgia's miles of track must have been less frequented than those in other States. Therefore the company showed facts sufficient to prove that the mileage ratio was unfair to it. The $250,000 excess cannot be regarded as the value of intangible property in Georgia. The

Georgia intangible property could be reached only by taking a fraction of a total intangible value. Had this been done, the total value reported by the company would have been, not $10,518,333.16, but several times that amount. Georgia's assessment by use of the mileage ratio would then have been, not $291,196, but a great deal more. The mileage ratio would have been as faulty if applied to the intangible as when confined to the tangible. The only difference would be that the company could not then establish Georgia's avarice without showing the average car mileage in other States as well as in Georgia. But in the situation before the court, this was not necessary. The company proved all that was needed. In addition, it got the State to concede that its assessment embraced a valuation of more cars than were actually used within the State.

The case, therefore, does not on its facts shake the previous idea that the taxpayer has the burden of showing that any application of the unit rule produces erroneous results. It does not on its facts stand for the proposition that the taxpayer can always establish the inapplicability of the track mileage ratio by showing that it results in an assessment in excess of the tangible value of the average number of cars actually within the State. It settles that proof of such results is sufficient where the State is taxing only tangible values. But the case may be different where the excess may *prima facie* represent intangible values. Here it may be that the proof required of the taxpayer will include the situation without as well as within the taxing jurisdiction. Such proof would be essential to establish that the proportion based on the track mileage ratio operated unfairly in the particular instance, however inaccurate and arbitrary it might be in general. Plainly enough, Mr. Justice Day would confine the case to its particular facts. Plainly enough, too, he feared that five of his colleagues would not do so. Justices Pitney, Brandeis and Clarke, who dissented, would of course confine the decision to the strictest limits. Such an effort would be facilitated by the State's concession that its assessment embraced a valuation of three hundred cars in excess of what the taxpayer had within the State and by the fact that its assessment of the total was confined to the value of the cars

as separate chattels. Yet it must be doubted whether the effort would meet with success. It is impossible to tell whether the track mileage ratio for the assessment of migratory cars is dead or merely diseased. Certainly the opinion of Mr. Justice McReynolds makes it look very very sick. If his four colleagues who acquiesced fully in his opinion had been unwilling to allow this impression to go forth, they would at least have joined in elaborating Mr. Justice Day's special concurrence.

A strong argument may be made in favor of complete abandonment of the track mileage ratio for the assessment of chattels. It is certain to work to the disadvantage either of the State or of the taxpayer in every case except the imaginary one where the relation between the number of cars and the miles of track within the State is identical with the same relation outside of the State. Even if this surprising situation appeared in one State, it would not follow that it existed in any other. The distribution in one State might be proportionate to the distribution in all others taken together, and yet the distribution in no one of the others taken separately be proportionate to anything outside.. The track mileage ratio would be fair enough to the taxpayer if all the States visited by his cars applied it uniformly, with uniform modes of assessing the total and with uniform rates of levy. But some States would be certain to get more than they deserved, and other States certain to get less. Those likely to lose are free to ascertain the property within the State by count and average. As we shall see in a moment, they would not thereby cut themselves off from taxing intangible as well as tangible values. Thus if the track mileage ratio is allowed, except where shown improper by positive proof, the taxpayer may be put to the necessity of fighting a dozen lawsuits a year to save himself from taxation on assumed parts which added together make more than the whole. The facts established in one year could not be taken as true for the next. Facts found by State tribunals are not ordinarily open to review in the Supreme Court. A theoretical exception exists when the issue of constitutionality turns on a question of fact, but the line of demarcation between the rule and the ex-

ception is as yet far from sharp.[81] Hence, if proof of the inappositeness of the mileage ratio is required, it is likely that acceptance or rejection of the proof offered would rest to a considerable extent with the State courts. The Supreme Court may well be loath to sanction a situation in which it must either accept the findings of State courts or must itself decide year after year a never-ending succession of disputes on questions of fact. If the track mileage ratio is practically certain never to approach accuracy, it may as well be abandoned altogether and not retained for the situations in which it may cheat the State rather than the taxpayer.

That such an abandonment would not restrict the State to the assessment of chattels as separate items of tangible property is evident from the cases that allow taxes on gross receipts in lieu of a property tax. Gross receipts from interstate commerce are not a proper subject of State taxation under traditional theories of the commerce clause.[82] But by a little legerdemain, an assessment of gross receipts is transformed into a tax on property if the property is not otherwise taxed.[83] The gross receipts are said to be merely the measure and not the subject of the tax. An authentic instance of the miracle appears in Cudahy Packing Co. *v.* Minnesota,[84] in which refrigerator cars running in and out of the State were taxed by taking a percentage of their gross earnings derived from business within the State. How these gross earnings were carved out of total gross earnings does not appear, except from the statement of

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[81] See the dissenting opinion of Mr. Justice Brandeis in Ohio Valley Water Co. *v.* Ben Avon Borough (1920) 253 U. S. 287, 40 Sup. Ct. 527.

[82] Fargo *v.* Michigan (1887) 121 U. S. 230, 7 Sup Ct. 857; Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania (1887) 122 U. S. 326, 7 Sup. Ct. 1118; Western Union Telegraph Co. *v.* Alabama Board of Assessment (1889) 132 U. S. 472, 10 Sup. Ct. 161; Western Union Telegraph Co. *v.* Texas (1881) 105 U. S. 460; Galveston, H. & S. A. Co. *v.* Texas (1908) 210 U. S. 217, 28 Sup. Ct. 638; Meyer *v.* Wells Fargo & Co., note 79, *supra.*

[83] Wisconsin & M. R. Co. *v.* Powers (1903) 191 U. S. 379, 24 Sup. Ct. 107; U. S. Express Co. *v.* Minnesota (1912) 223 U. S. 335, 32 Sup. Ct. 211; and Maine *v.* Grand Trunk R. Co. (1891) 142 U. S. 217, 12 Sup. Ct. 121, as reinterpreted by Mr. Justice Holmes in Galveston, H. & S. A. Co. *v.* Texas, note 82, *supra.*

[84] Note 74, *supra.*

Mr. Justice Van Devanter that the statute as applied by the State court requires the company "to report annually its gross earnings from the operation of its car line within the State." [85] The company made no claim that Minnesota reached extra-state earnings. Its chief objection was that the percentage of gross receipts taken by the State yielded considerably more than what the State would get by applying to the value of the cars the usual rate of property taxation, and that therefore the tax could not be saved by regarding it as one on property. This objection and the court's answer to it is put by Mr. Justice Van Devanter as follows:

> "Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds upon an erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately,—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on property, taken at its real or full value." [86]

This was said a year prior to the Union Tank Line Case. Mr. Justice Pitney could not have thought that the majority opinion in that case cut Georgia off permanently from reaching the intangible value flowing from the use of the tank cars. When he says that "a valuation according to aggregate car mileage would virtually ignore the particular value due to the relation of the cars to the rail system",[87] he must be confining his attention to such a valuation under the Georgia statute before him. Georgia has only herself to blame for this result, as she had no

[85] 246 U. S. 450, 452.
[86] *Ibid.*, 455-456.
[87] 249 U. S. 275, 290. See, *supra*, p. 268.

device for getting at the particular value due to the relation of the cars to the rail system. The majority opinion means that she cannot make up for her moderation in this respect by using a different device by which she seeks to tax more cars than she entertains. But if Georgia copies the Minnesota statute, she will get all that she deserves of both the tangible and the intangible.

The decision in the Cudahy Packing Case was unanimous. So was that in Wallace *v.* Hines,[88] decided a year after the Union Tank Line Case. This involved the use of the track mileage ratio in assessing an excise tax on an interstate railroad. Mr. Justice Holmes states the situation as follows:

> "As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain." [89]

Here, then, all the members of the court agree that facts stated in a bill may make the track mileage ratio inapposite for the assessment of a tax that seeks to reach the value of right of way as well as of rolling stock. *A fortiori* they should agree that facts may show the rule bad for the taxation of rolling stock alone. Each mile of track is much more apt to be worth the same amount than to have the same number of cars pass over it during any given period. How can Mr. Justice Pitney square

[88] (1920) 253 U. S. 66, 40 Sup. Ct. 435.
[89] *Ibid.*, 69.

his acquiescence in the judgment that circumstances may show the mileage ratio unsuitable for the valuation of the physical track with his refusal to concede a year earlier that the facts in the Union Tank Line Case did not entitle the complainant to relief? He may, of course, have misapprehended the facts in the earlier case. He seemed not to appreciate that the question of proportion was distinct from that of the assessment of intangible value. If he would differentiate the two cases on their facts, his earlier dissent probably does not mean that the track mileage ratio when applied to rolling stock is not subject to scrutiny and revision. His objection in the Union Tank Line Case that, where the complaint is based on peculiar facts, the taxpayer must seek administrative relief before applying to the courts, was, for anything that appears, equally open to him in Wallace *v.* Hines.[90] The best explanation of these apparently divergent positions would be either that Mr. Justice Pitney and his fellow-dissenters in the Union Tank Line Case have been converted or that they yielded to the doctrine of the case out of respect for the canon of *stare decisis*. It is still possible, however, that they thought the difficulties in the way of exactness greater in the assessment of rolling stock than in that of the whole property of a railroad, and that since no rule had any precision, they would accept the one that the State adopted.

The assessment enjoined in Wallace *v.* Hines[91] was said to be one that under the facts stated in the bill "would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law." For this were cited the Union Tank Line Case and Fargo *v.* Hart,[92] in both of which the Fourteenth Amendment had been relied on. These cases establish beyond a doubt that the type of extraterritorial taxation indulged in by allocating to a State more than its proper share of an aggregate that straddles several States is forbidden by due process of law. The improper use of the mileage ratio is one of the ways of taxing for a year what is within the jurisdiction for a shorter stay. Any form of that

[90] Note 88, *supra*.

[91] Note 88, *supra*.

[92] Note 79, *supra*.

sin is an offence against a proper conception of *situs*. There seems no doubt that the court now recognizes it as such. Mr. Justice Holmes tells the whole story in a mythological simile in his opinion in Wallace *v.* Hines.[93] After saying that the plain injustice of assuming the value of the physical track to be evenly distributed according to mileage "is not all", he goes on:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State." [94]

"Exposing the heel to a mortal dart" is primarily a transgression of the territorial jurisdiction of the State. Its offence against the commerce clause is secondary. The commerce clause is adduced, not because the subject taxed is any more interstate commerce than those subjects on which the tax is sustained, but because poaching on extra-state preserves adds unduly to the burdens of interstate commerce. But such poaching is bad just because it is such poaching; and one reason for holding it bad should be as good as two.

If it is agreed that taxing property whose presence within the State is evanescent has elements of the same vice as taxing more peripatetic property than the average that is within the State, we may conclude that the Supreme Court does not enter-

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[93] Note 88, *supra*.

[94] 253 U. S. 66, 69-70.

tain the idea that temporary presence is enough to confer jurisdiction to tax. This leads us to dismiss the first of the three possible inferences from the cases that have denied shelter under the commerce clause to oil and coal and grain that had paused in its interstate transit for some independent object. In those cases the due-process clause was not adduced; in the cases where the mileage ratio was held to require modification, it was. We have still to inquire whether the exemptions denied under the commerce clause would have been granted under the Fourteenth Amendment, or whether in those cases the court was applying its conception of *situs* and finding that the taxation in question did not violate the principle of extraterritoriality. Before undertaking this inquiry, attention will be given to taxation of property in transit by the jurisdiction in which the owner is domiciled, and to the due-process claims of visiting property that is clearly entitled to no protection under the commerce clause.

[*To be concluded.*]

Thomas Reed Powell.

COLUMBIA UNIVERSITY.